Nos. 18510 to 18533, 18866 to 18872

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED AIR LINES, INC.,

Appellant,

vs.

JANICE WIENER *et al.* (24 cases); CATHERINE B. NOLLENBERGER *et al.* (7 cases); UNITED STATES OF AMERICA (31 cases),

Appellees.

BRIEF OF APPELLEE UNITED STATES OF AMERICA.

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TOPICAL INDEX

Page

TABLE OF AUTHORITIES CITED

Page

Textbooks

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Introductory Statement.

References to the pleadings in all cases necessary to show the existence of jurisdiction of the District Court, and jurisdiction of this court are contained in separately bound appendices to the opening brief of appellant United Air Lines, Inc. and the opening brief of the United States of America as appellant, to both of which this court is respectfully referred.

References to the record in the several cases and to the reporters transcript are in accord with the method set forth in the opening brief of appellant United Air Lines, Inc., pages 3 to 5. Appellant United Air Lines, Inc. is referred to herein as United. Appellee United States of America is referred to herein as the Government.

Scope of Argument by Appellee United States of America.

The Government's response to the opening brief of United Air Lines will be directed to the following contentions of United on this appeal:

(1) The District Court erred in the 22 nongovernment-employee cases, in denying indemnity to United and in awarding contribution in any amount to the Government (United Brief, 22-59).

(2) The District Court erred in the nine government-employee cases, in denying to United the right to seek indemnity from the Government, and in dismissing United's cross-claims seeking same (United Brief, 60-64).

The essence of United's position on appeal regarding indemnity and contribution is dual in nature. On the one hand, United takes the position that the trial court findings of active negligence on its part are unsupported by the evidence and are clearly erroneous.

On the other hand, United urges this court to find on the evidence that it was merely passively negligent, or that the Government was guilty of gross negligence or willful and wanton misconduct.

In opposition to United's position, the Government will demonstrate that all of the trial court findings of active negligence on United's part are predicated upon substantial evidence, and based upon sound and controlling principles of law, and that the findings of the trial court on the issues of indemnity and contribution are similarly sustainable. The affirmation of the trial court findings on these issues will thus dispose of United's alternative contentions that this court should find only passive negligence on its part, or that the

Government was grossly negligent; however, the Government will draw the court's attention to its previously stated position concerning contentions that this court should weigh the evidence, or have a trial *de novo,* or make new findings.

As to United's contentions in this court regarding the nine government-employee cases, the Government will demonstrate that United's interpretation and reliance upon the cases of *Weyerhaeuser S. S. Co. v. United States,* 1963, 372 U. S. 597, judgment recalled and new judgment issued, 374 U. S. 820, and *Treadwell Construction Co. v. United States,* 1963, 372 U. S. 772, are misplaced. Furthermore, the Government will show that the trial court properly dismissed United's claims for indemnity in those cases.

This court's attention is respectfully drawn to the opening brief of the Government as appellant in which the Government has challenged the trial court findings of negligence on the part of the Government—particularly the Nellis Command and the Civil Aeronautics Authority—and the defenses there asserted under 28 U. S. C., § 2680, together with other defenses there asserted pertaining to the trial court findings regarding negligence on the part of the Government pilots. United's position on appeal regarding indemnity and contribution is based in part on findings which are the subject of appeal by the Government. Any position taken by the Government, as appellee in opposition to the appeal by United, which seems to be not in harmony with its (the Government's) position as appellant on its own appeal should not be construed as a waiver by the Government as appellant of any position taken by it on that appeal.

Preface to the Argument.

In the first phase of its argument, the Government as appellee will demonstrate that there is substantial evidence in the record to support the findings of the trial court that United, the operating crew of United's DC-7, and United's employees were negligent as found, and that such negligence was active and not passive.

Such findings, supported by substantial evidence as the Government will demonstrate in its argument, were not clearly erroneous and are conclusive on appeal. Rule 52(a), Federal Rules of Civil Procedure; *United States v. United States Gypsum Co.,* 1948, 333 U. S. 364; *Bloom v. United States,* 9 Cir. 1959, 272 F. 2d 215; *Overman v. Loesser,* 9 Cir. 1953, 205 F. 2d 521, *cert. denied,* 1953, 346 U. S. 910.

Although there is substantial evidence to support all of the court findings indicated above, the Government will demonstrate with particularity the evidence in support of the trial court finding that the crew of the DC-7 *could have and should have seen* the Government jet, and *could have and should have taken* evasive action [F. 73], and also that the trial court findings relating to United's lack of a systematic program of scanning and orders for operation of its aircraft through a dangerous area [FF. 76, 77] are fully supported by the evidence.

A properly oriented review of the trial court findings and the record requires a preliminary examination of the terms, "IFR flight plan", "VFR conditions", and "IFR conditions", their significance in this case, and their relationship to one another. Since the record and United's opening brief are replete with references to those terms, it is necessary initially to place them in their proper perspective.

It is undisputed that the skies over Las Vegas at the time of the collision were clear with a visibility of 35 miles. In view of the optimum visibility conditions then existing, it is uncontroverted that the collision occurred in ideal VFR weather, where the ability to see and be seen was limited only by the capabilities of the human eye. It is further undisputed that United's Flight 736 had filed an IFR flight plan before leaving Los Angeles. Neither the Civil Air Regulations nor military directives imposed upon the Government an obligation to obtain an IFR clearance for the F-100F involved in the collision [9 Rep. Tr. 1162]. Accordingly, all parties agreed that United's flight was flying pursuant to an IFR clearance, and the F-100F was being flown under rules of flight for VFR (Visual Flight Rules) conditions. However, the duties devolving upon United's crew because of VFR weather conditions are all but obscured in United's opening brief. In the Government's view, only by determining what rules apply for separation of aircraft in VFR weather conditions, when one plane is flying pursuant to an IFR flight plan and another plane is flying VFR, can the respective duties of each crew be established and the critical issues be intelligently evaluated.

In VFR weather conditions, the record indicates a unanimity of expert opinion that the duty to avoid other aircraft rests solely on the operative personnel [8 Rep. Tr. 1039; 31 Rep. Tr. 4127-4128; 9 Rep. Tr. 1161; 30 Rep. Tr. 4064-4065; 15 Rep. Tr. 2037]. Not one witness, whether called by United, the Government, or the various plaintiffs, testified to the contrary or took any issue with this premise.

In view of the decisional law on the subject, *New York Airways, Inc. v. United States,* 2 Cir. 1960, 283 F. 2d 496; *United States v. Schultetus,* 5 Cir. 1960, 277 F. 2d 322, it is understandable why the "see and be seen" concept is uniformly recognized as the standard of care applicable generally, and particularly to this lawsuit. The Government's position was concisely stated in *United States v. Schultetus, supra,* at 327:

> " 'When flying in visual flight rule weather conditions, (*regardless of the type flight plan or air traffic clearance*), it is the direct responsibility of the pilot to avoid collision with other aircraft.' " [Quoting from Speiser, Preparation Manual for Aviation Negligence Cases 397.] (Emphasis added.)

The CAA Flight Information Manual in effect on April 21, 1958 [Ex. G-2], fully accords with the cited cases [Ex. G-2, p. 58]:

> "Traffic clearances will only provide standard separation between IFR flights. *During the time an IFR flight is operating in VFR weather conditions, it is the direct responsibility of the pilot to avoid other aircraft, since VFR flights may be operating in the same area without the knowledge of ATC."* (Emphasis in the original.)

To avoid belaboring the obvious, the Government need only turn to the testimony of Mr. Christenson, Director of Flight Safety for United Air Lines [29 Rep. Tr. 3987-3988], where he succinctly confirms the Government's position—*responsibility for the separation of two aircraft under the conditions prevailing at the time of the collision rested solely on the operating personnel of the respective aircraft* [30 Rep. Tr. 4064-

4065]. Mr. Christenson's testimony in this regard is in complete harmony with the position of the Civil Aeronautics Board regarding responsibility for avoidance during VFR (Visual Flight Rules) conditions as stated in Exhibit G-19.

> "The current provisions of Part 60 of the Civil Air Regulations classify all air traffic into two broad categories: (1) VFR, or that category of air traffic operating in weather conditions in which it is assumed that all pilots are able to see and avoid other aircraft, and (2) IFR, or that category of air traffic operating in weather conditions in which it is assumed that pilots are not able to see and avoid other aircraft. Weather conditions which limit the range of visibility of a pilot, therefore, are the principal factors determining the applicability of these rules.
>
> "The current concept of flight operations is based upon the principle that pilots shall provide their own separation when visibility conditions are such that they can see and avoid other aircraft. When visibility deteriorates to the extent that this can no longer be done, other means for providing separation must be devised. Air traffic control is established for the purpose of maintaining safe traffic separation in controlled airspace under conditions in which it is impossible for pilots to perform such functions themselves."

The repeated attempts by United in its opening brief to establish some sort of a preference over other air traffic for its DC-7 *flying in VFR conditions* based solely on an IFR clearance is, accordingly, without merit.

ARGUMENT.

The Finding of the Trial Court That the Crew of the DC-7 Could and Should Have Seen the F-100F and That It Negligently Failed to Do so Is Supported by Substantial Evidence.

A. The Evidence in Support of the Finding.

The trial court properly found that the crew of the DC-7 could have seen the F-100F [F. 73]. The evidence in support of the finding includes a consideration of the evidence with regard to (1) the airspace within which the F-100F descended during the period of time immediately prior to the collision, and (2) the vertical and horizontal visual scan (or search) capabilities of the crew of the DC-7, with relation to such airspace.

The record indicates that normal visual vertical scan of a pilot and crew is approximately 20°, *i.e.*, 10° above and 10° below horizontal [43 Rep. Tr. 5706-5707].

The DC-7 approached the point of collision in level flight, traveling 350 miles per hour [R. 1604] at its cruising altitude of 21,000 feet, having reached such altitude at about 8:11 a.m. [R. 1597-1598; 44 Rep. Tr. 5772]. The general direction of its flight out of the southwest along Victor 8 Airway was almost squarely toward Radio Station KRAM [Diagram, Exhibit G-21A].

The F-100F reported its position over Radio Station KRAM at 8:27 a.m. [R. 1602]. Continuously thereafter the F-100F was ahead and slightly to the left of the DC-7 [see Ex. G-21A] in 7,000 feet of airspace (between 28,000 and 21,000 feet) within a radius of 15½ miles of Radio Station KRAM [18 Rep. Tr.

2396]. During the time the F-100F was within that 7,000 feet of airspace and within a 15½ mile radius of Radio Station KRAM, the evidence amply supports the trial court finding that it could have been seen by the crew of the DC-7, *i.e.,* it was within their normal scan range and area of search. The facts in evidence, as the Government will show, logically lead to only one conclusion, and that is that the angle of descent of the F-100F was approximately 5° from the time it departed 28,000 feet until it rolled into a 90° bank in an evasive maneuver designed to avoid the DC-7.

Execution of the KRAM procedure calls for an *angle of descent* by the F-100F of 5° [42 Rep. Tr. 5646-5647]. This represents a *rate of descent* of 5,000 feet per minute [11 Rep. Tr. 1493]. Thus, on an angle of 5°, the rate of descent is 1,000 feet in each 12 seconds, and a descent of 7,000 feet is accomplished in approximately 84 seconds (1 minute and 24 seconds). Based upon this evidence, the trial court could reasonably infer that the F-100F did, in fact, descend from 28,000 feet to 21,000 feet[1] in one minute and 24 seconds, and that its angle of descent was, in fact, 5°. The reasonableness of these inferences is firmly supported by the results of five flight tests flown by LtCol. Lewis, an Air Force test pilot, three days after the collision [37 Rep. Tr. 4928, 4936]. The tests were purposely designed with a wide range of headings and speeds because one of them could conceivably have been the one used by the ill fated F-100F [37 Rep. Tr. 4932]. Details of those flights and the re-

[1]At 8:28 the F-100F reported departing 28,000 feet [21 Rep. Tr. 2752]; the collision occurred at 21,000 feet [R. 1601].

sults thereof are set forth in Exhibits G-48A and 48-B. That portion of Exhibit G-48B pertaining to the five test flights of the F-100F recites:

28,000 Test

Test	Speed	Heading to Fix	Time to 21,000	George F Position
#1	280 Kts	190 Deg	1:20	EF 5559
#2	290 Kts	150 Deg	1:30	EG 5302
#3	300 Kts	200 Deg	1:20	EG 5105
#4	310 Kts	260 Deg	1:30	EG 4505
#5	320 Kts	170 Deg	1:25	EF 5459

The significance of the five flight tests cannot be over-emphasized. The significant factors are:

1. Each flight test commenced descent over KRAM at 28,000 feet, and reached 21,000 feet at a point in space where the collision could or did occur [37 Rep. Tr. 4988-4990].

2. The time of descent was accurately measured [37 Rep. Tr. 4940-4942].

3. The measured time of descent from 28,000 feet to 21,000 feet varied *only* between one minute 20 seconds and one minute 30 seconds [Ex. G-48B]. The average measured time for five flights was one minute 25 seconds [Ex. G-48A]. [Compare with previously referenced evidence that *at an angle of 5°* the time required to descend 7,000 feet is equal to one minute 24 seconds.]

It is further significant to note in Exhibit G-48B that *notwithstanding* a wide latitude in headings on approach to KRAM ("Heading to Fix") varying a full 110° (from 150° to 260°), and *notwithstanding* a range of 40 knots in differences in speeds, the *elapsed time* of descent for 7,000 feet varied *only* five seconds from the average of one minute 25 seconds.

These flight tests, therefore, are substantial proof of an angle of descent by the F-100F involved here of 5°, and *well within* the normal vertical 10° above horizontal area of scan capability of the crew of the DC-7.

The interval of time between the report by the F-100F of departing 28,000 feet and the report by the DC-7 of the accident to ARINC[2] requires analysis and comment.

The F-100F reported departing 28,000 feet at 8:28 [21 Rep. Tr. 2752; R. 1602]. Two minutes 20 seconds later (at 8:30 plus 20 seconds) the DC-7 commenced the report of the collision to ARINC [R. 1600]. If, in fact, as the Government submits, the F-100F descended on an angle of 5° to the point of collision between one minute 20 seconds and one minute 30 seconds, then a period of time between 50 and 60 seconds elapsed after the collision before the DC-7 commenced the report to ARINC. This 50 to 60 second period of time is readily accounted for in view of and based upon the facts in evidence.

LtCol. Lewis dramatically described the effect on the pilots and on the aircraft of a mid-air collision [37 Rep. Tr. 5051-5052]. He indicated that severance of the right wing causes the aircraft to initially roll to the right and lose its air dynamic capabilities. The aircraft then becomes a projectile, and it yaws and oscillates and goes into a tumble. The effect on the occupants is to cause them complete deterioration and they are violently flung from one side to another. Although LtCol. Lewis was describing an F-100F and its pilots, it is reasonable to infer that the DC-7 and its crew

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[2]Aeronautical Radio, Inc., is the radio communication facility utilized by United's Flight 736 on April 21, 1958.

would be subjected to similar conditions. Witness Allen White, who observed the collision from the ground, testified that the DC-7 *wobbled* after the crash occurred [45 Rep. Tr. 5999]. The wobbling was obvious to him even though the DC-7 was approximately *four miles (21,000 ft.) above him.* It can reasonably be assumed that the pilot and crew of the DC-7 would be subjected to an initial period of severe shock, stunning or dulling the mental processes. Concerned with their own safety and the safety of the passengers, the crew's first reaction would probably be to exert their total mental faculties and physical energies in an effort to regain control of the aircraft. In view of the gyrations of the aircraft as described by Lt. Col. Lewis, the probabilities are that some period of time would elapse before the crew became fully cognizant of the peril of their position. The Government submits that it is entirely reasonable to infer that under such circumstances a period of 50 to 60 seconds would elapse prior to the deliberate sending of a radio message of their perilous condition. Especially is this true when, as here, an experienced crew would know that the radio message could in no way remedy the hopelessness of the disastrous situation.

Since in a finding distinct from the one under consideration here [F. 73], the trial court found that the angle of descent of the F-100F *at the time of impact* was 17° [F. 36], it is appropriate to demonstrate that such an angle of descent *at the time of impact* is not inconsistent with, and, in fact, is entirely in harmony with the evidence relating to the angle of descent of 5° of the F-100F *prior to the time of impact.*

The evidence is undisputed that *at the time of impact* the F-100F was banked at 90° so that its right wing

was perpendicular to the right wing of the DC-7 [42 Rep. Tr. 5552; 25 Rep. Tr. 3441-3442]. As United's structures expert, Professor Bisplinghoff, acknowledged, the posture of the F-100F in a 90° bank represented to him that the F-100F was, *at the time of impact,* in an evasive maneuver [43 Rep. Tr. 5693]. At this point it is important to point out that the *attitude* of an F-100F descending at an angle of 5° is 10° nose down, *i.e.,* the nose of the plane is 10° below horizontal [11 Rep. Tr. 1493; 42 Rep. Tr. 5647]. Therefore, at the time the F-100F commenced its evasive maneuver and rolled into a 90° bank, its *attitude* was 10° nose down. A sudden 90° bank necessarily increases the aircraft's descending attitude, primarily due to the sudden loss of vertical lift on the wing surface. With the wings perpendicular to the gravity vector, as is the case in a 90° bank, the aircraft has lost some of its supporting capacity. This produces a "drop", or if the aircraft is already in a descending attitude, as was the F-100F, the angle of descent would rapidly and continuously increase. To avoid unnecessary involvement in principles of aerodynamics, the Government submits that the foregoing facts are wholly sufficient to harmonize the trial court finding of 17° *at the time of impact,* and an angle of descent *prior to the time of impact* of 5°.

Since evidence concerning the evasive maneuver of the F-100F has been discussed above, the court's attention is drawn to the testimony of Professor Bisplinghoff, who concluded upon examination of the wreckage that the DC-7 had been in straight and level flight prior to the collision without making *any* evasive maneuver whatsoever [43 Rep. Tr. 5693].

Next to consider is the evidence regarding the area of search within the normal horizontal scan capability of United's crew, and its relationship to the airspace within which the F-100F descended immediately prior to the collision.

United's expert witness Professor Bisplinghoff, indicated that the true relative bearing of the F-100F with respect to the DC-7, measured counterclockwise from the nose of the DC-7, was 37° on an inclined plane, or 33° on a horizontal plane [42 Rep. Tr. 5601-5602]. Professor Bisplinghoff summed up the 33° angle by pointing out that if a piece of chewing gum were placed on the windshield of the DC-7, 33° to the left of straight ahead, this would represent the line of sight to the F-100F, if the latter's course prior to collision was unvaried [42 Rep. Tr. 5603]. By relating the angle under discussion to the hands of a clock, it is apparent that according to United's structures expert, the F-100F's angle of approach was just to the left of 11 o'clock.[3] One only has to look at the hands of a wristwatch to see that the converging courses of the two aircraft immediately prior to the collision in no way created a visibility problem horizontal-wise for the crew of the DC-7.

In summary, the Government submits that there is substantial evidence in the record in support of the trial court finding that the crew of the DC-7 could have seen the F-100F [F. 73] from the point of view that the F-100F descended from 28,000 feet to the point of collision at an angle of about 5° within the vertical and horizontal sighting capabilities of the crew of the DC-7.

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[3]90° to the left of straight ahead would represent 9 o'clock; 60° would represent 10 o'clock; and 30° would represent 11 o'clock.

In addition to the evidence referenced by the Government in the foregoing argument, the record contains other evidence in support of that finding [F. 73].

LtCol. Lewis, who was an experienced commercial pilot as well as an Air Force jet pilot [37 Rep. Tr. 4916], testified that the same amount of airspace is visible from a commercial type aircraft as from an F-100F [37 Rep. Tr. 4952]. In addition to the five flight tests to which the Government has previously made reference, he simulated the flight of the DC-7 along Victor 8 at an altitude of 21,000 feet. The result of that flight as to visibility is set forth in Exhibit G-48B thus:

> "Visibility observed during inbound track of 030 degrees along Victor 8 at an altitude of 21,000 feet covers the entire penetration path established for the let-down on Radio Station KRAM. This observation can be made within 19 miles of Las Vegas VOR at 21,000. Considering the reported penetration altitude of the F-100F at 28,000 feet, *it would have been possible to observe the F-100 from its position over Radio Station KRAM at 28,000 to the point of mid-air collision.*" [Ex. G-48-A.] (Emphasis added.)

Additionally, on this particular flight, LtCol. Lewis saw and identified a DC-7 *twenty miles* away [37 Rep. Tr. 5035]. Even at a closure rate of 735 miles per hour, observation of another aircraft at a distance of twenty miles would allow over 1½ minutes for evasive action (735 MPH is equivalent to 12.225 miles per minute).

An additional factor, bearing on the ability of the crew of the DC-7 to see the F-100F, is the probability

that the F-100F created a contrail. One of the eye-witnesses stated that "the vapor trail—it kind of swooped down" *before* the collision [45 Rep. Tr. 5998]. While the Government is not inclined to place unreserved reliance on the testimony of a nine-year-old child, numerous other qualified witnesses agreed that contrails were a common sight over Nellis Air Force Base [24 Rep. Tr. 3239; 40 Rep. Tr. 5372 [testimony of United employees Hoy and Cullerton]]. In fact, the conspicuity of contrails is such that at a distance of *29 miles,* an aircraft could be sighted without much difficulty [18 Rep. Tr. 2408-2409; 20 Rep. Tr. 2720-2721]. In view of the ideal weather prevailing on the morning of the collision, the existence of a contrail would merely increase the already sufficient opportunity of the crew of the DC-7 to observe the approaching F-100F.

The court found that necessary action could have and should have been taken by the crew of the DC-7 for the avoidance of the collision [F. 73]. Implicit in this finding is the conclusion by the trial court that the F-100F could have been seen *in sufficient time* to take evasive action. This finding of the trial court is similarly well supported by the evidence. It could well rest on a consideration of Exhibit G-21A, and arithmetic computations drawn from evidence of the rate of closure between the two aircraft and the pre-collision speed of the DC-7. For example, the rate of closure was testified to be 735 miles per hour [27 Rep. Tr. 3729]. This speed is equivalent to approximately 12.3 miles per minute. Further, the true air speed of the DC-7 was 350 miles per hour [R. 1604], which is equivalent to approximately 5.85 miles per minute.

Thus, at the moment the F-100F departed 28,000 feet, 1½ minutes prior to the collision, the DC-7 was 8.78 miles away from the point of collision. At the same moment (1½ minutes pre-collision), based upon the closure rate, the two aircraft were approximately 18½ miles apart. At 45 seconds pre-collision, when the F-100F had descended to approximately 24,500 feet, the DC-7 was approximately 4.3 miles from the point of collision, and the two aircraft were approximately 9.25 miles apart. Thus the trial court could well have found, based upon the foregoing computations, that 1½ minutes and 18½ miles, or even 45 seconds and 9.25 miles, was ample time and distance for the crew of the DC-7 to have taken evasive action and avoided the collision.

Based upon all the foregoing, the Government submits that the evidence which it has cited to this court and the reasonable inferences that can be drawn therefrom compel the conclusion by this court that there is substantial evidence to support the trial court finding that the crew of the DC-7 could and should have seen and taken the action necessary to avoid the collision, and negligently and carelessly failed to see and to take the action necessary for the avoidance of the collision [F. 73].

B. Lack of Merit of United's Attack on the Finding.

United in its opening brief attacks the trial court finding that the crew of the DC-7 could and should have seen the F-100F [F. 73]. Its position is succinctly stated thus:

Premise. "the angle of descent of the jet *at time of impact was 17°*" (United Brief, 55). (Emphasis added.)

Premise. "the range of vision upward of the crew of the DC-7, due to structural limitations of the windscreen, was limited to approximately 10° above the horizontal." (United Brief, 53).

Conclusion. "it is to be concluded . . . that the crew of the DC-7 could not have seen the descending jet until practically the very instant of impact." (United Brief, 55).

The patent fallacy of this specious argument needs little more than mere recital to reveal the artifice of its conclusion, ignoring, as it does, the element of the angle of descent of the F-100F *prior to the time of impact.*

As the Government has shown, the angle of descent of the F-100F *during its descent from 28,000 feet* was approximately 5°, and, consistently, its angle of descent *at the time of impact* was approximately 17°. Both of these angles of descent, at the times indicated, are in complete harmony with evidence to which the Government has referred. Further, in consonance with the evidence, the Government has demonstrated that the F-100F was descending on an angle of 5° for at least one minute and 20 seconds *prior to the time of impact,* and that the 17° angle *at time of impact* is reasonably attributable to an evasive maneuver involving a 90° bank.

Apart, however, from the illogic of United's argument, another fatal weakness lies in the factual falsity of one of its premises. United's assertion is "the range of vision upward of the crew of the DC-7, due to structural limitations of the windscreen, was limited to approximately 10° above the horizontal." (United Brief, 53). This assertion is unsupported by *any* reference

to the record for the reason that the record is absolutely void of any proof concerning the windscreen structure of the DC-7.

United in its opening brief quotes a portion of the testimony of Major Brennan (United Brief, 54). However, the *most* that can be gleaned from Major Brennan's testimony is that the normal vertical search area for pilots in aircraft *generally* is approximately 10° above and 10° below horizontal, which will vary from cockpit to cockpit because of limitations. From this testimony (and *only* this testimony) United concludes, and urges this court to believe, that the *specific* DC-7 involved in this collision had *in fact* a limitation characterized by United as "a structural limitation of the windscreen." If, *in fact,* the windscreen structure of the DC-7 limited the vertical search of the crew to 10° above the horizontal, United was in a unique position during the trial to introduce into evidence elaborate scale drawings and expert testimony as proof of this fact. However, it introduced not one scintilla of such evidence—oral, written, expert, or demonstrative. Under such circumstances, of course, the presumption is that no such proof exists. Especially is that true in this case, where United bases its entire case upon the truth of the assertion.

However, notwithstanding the fictitious assertion, a visual deficiency due to the structure of the windscreen would provide no defense, as a matter of law. In *Kuhn v. Civil Aeronautics Board,* D. C. Cir. 1950, 183 F. 2d 839, the court had occasion to consider precisely the same issue. In that case, the Civil Aeronautics Board suspended the license of a pilot for, among other reasons, failing to overcome the visual deficiencies of

his craft, and in failing to maintain a proper lookout. The pilot's defense was that his vision was limited due to the structure of the craft. The court said (p. 843):

> "Each crew contends its plane was flying down the airway and that the other craft was crossing the airway and hence was responsible for the collision. It seems clear, however, that while the Universal pilot was unaware that other aircraft might be using the same airway, petitioner possessed information sufficient to alert him to the fact that he would overtake the other plane somewhere near the point of collision. The central question posed by the Board and resolved against petitioner was whether he 'could and should have seen the DC-3 in time to have avoided the collision.' This statement of the issue accords with conventional tort law, its purpose being to ascertain whether petitioner acted as a reasonable man would have under such hazardous circumstances. In holding that he did not satisfy the proper standard of care, the Board focused its attention on whether or not petitioner had done all he 'could or should' to overcome the visual deficiencies of his craft. According to petitioner, his view of the approaching DC-3 was obscured by a windshield post at his left and he could not possibly see around it at the particular angle of approach. It would seem that blind spots or visual deficiencies such as these are almost inevitable in any vehicle requiring structural supports. Given such blind spots, it was incumbent upon petitioner to do his utmost to overcome them by moving his head or body from time to time, just as the driver of an automobile copes

> with the many obstructions to his view. In addition, despite petitioner's awareness of impending danger, no effort seems to have been made to put the co-pilot, who was seated on the right, on other than the customary lookout. But even if the co-pilot had been specially alerted, it would not have eliminated petitioner's responsibility for the area peculiarly within his field of vision—the left—where the collision took place. We are unable to say that the Board's inferences from these facts—from its knowledge of the structure of the plane and its visual deficiencies, from an appraisal of the visibility that day, the respective angles of approach and speeds—were not supported by substantial evidence."

The *Kuhn* case suggests that an awareness of impending danger imposes more than customary alert. The court indicates that in such circumstances due care requires special alertness.

In sharp contrast to the *Kuhn* decision is the picture drawn by United in its opening brief of its three-man crew lethargically sitting in utter complacency accepting, as United urges, a structural limitation upon their vertical scan capabilities as the aircraft in their charge heads directly into a hazardous area. In fact, the hazards of the area are dramatically described by *United* officials thus:

(A) W. E. Larned, Manager, Flight Operations at Los Angeles [33 Rep. Tr. 4439-4440]:

> In the vicinity of Nellis Air Force Base the hazards of mid-air collisions were very grave [33 Rep. Tr. 4521].

United pilots were aware of the heavy jet traffic in the Nellis area [33 Rep. Tr. 4480, 4535-4536].

The caution area as shown on the map in the vicinity of Nellis would confirm the knowledge which pilots already possessed concerning the type of activity carried on in that area [34 Rep. Tr. 4612].

(B) E. F. Cullerton, Flight Manager, Denver, Colorado, exercising supervisory charge over United flight officers, with 18 years experience [40 Rep. Tr. 5354-5355]:

Because one of our flights that we flew out of Denver made a landing at McCarran, we were well aware of the inherent danger of the activity in the Nellis Air Force Base pattern [40 Rep. Tr. 5368-5369].

(C) Dick R. Petty, Senior Vice President of United [38 Rep. Tr. 5068-5069], occupying the top policy position in the field of flight safety for United [33 Rep. Tr. 4444-4445; 38 Rep. Tr. 5068-5069]:

All pilots who flew in the Nellis area were aware that it was a jet air base [38 Rep. Tr. 5075-5076].

Both the Jeppesen charts and the United Manual showed that there was heavy traffic in the vicinity of Nellis [38 Rep. Tr. 5090].

Jeppesen charts indicate that there was heavy traffic in the Nellis area, and the United pilots were expected to examine and to learn this fact from the Charts [38 Rep. Tr. 5154].

> Pilots, with their years of experience, knew what a restricted area meant, and they knew that there was heavy traffic in the entire area [38 Rep. Tr. 5155].

The object in spelling out the nature and extent of knowledge by United of the conditions prevailing at Nellis Air Force Base is to bring into proper focus against that background the contention of United that its three-man crew on the DC-7 could accept with impunity the visual limitation allegedly built into the windscreen. Notwithstanding an admitted (by United) handicap in vertical scan capability due to windscreen structure, United has made no reference in its opening brief to any evidence in the record indicating that an effort was made to do anything other than maintain customary lookout. In fact, United's argument rather locks on to the proposition that nothing further was even required of the crew. It would seem, and the Government submits, that due care under the circumstances required that, as a matter of United Air Lines policy, when approaching Nellis Air Force Base at least one of the three members of the crew should have been specially alerted, and taken a position in which the alleged structural limitation would present no visual deficiency. In the absence of such evidence, the only reasonable conclusion to be drawn is that notwithstanding actual knowledge of existing hazards at Nellis Air Force Base, the crew of the DC-7 maintained an utterly complacent attitude regarding visual deficiencies of their aircraft.

The Government submits that complacency in such circumstances goes beyond mere failure to exercise due care, but is properly labeled recklessness, or willful

and wanton negligence. *At the very least,* the trial court findings of *active negligence* [FF. 72, 84; Conc. Law XIII] was entirely justified.

Indeed, United's characterization of the Government as reckless is clearly descriptive of the DC-7 crew, and this is particularly true in view of the fact that the crew consisted of *three well qualified* officers of considerable commercial airline experience [see Exs. U-33, U-34, and U-35], any one of whom could have been specially alerted and devoted his whole time and attention to forward scanning in such position as would overcome any alleged visual deficiencies.

Contrary to United's position that they (the DC-7 crew) did not see because they could not see (the F-100F), the trier of fact could very well have concluded that they did not see *because they did not look.*

In summary, United's conclusion that the crew of the DC-7 could not have seen the descending jet until practically the very instant of impact is legally unsupportable because (1) it is, as a matter of logic, untenable; (2) it is factually unsupported by any evidence in the record; (3) it is based upon a premise which, as a matter of law, constitutes no legal defense.

The Trial Court Findings of Pre-Collision Negligent Omissions by United Are Supported by Substantial Evidence.

A. Evidence in Support of the Findings.

The particular findings under consideration are Findings 76 and 77. The former finds United negligent for failing to instruct or train its crews in systematic scanning, and letting the manner of scan be handled by the individual flight captains. The latter finds

United negligent for failing to adequately inform and instruct its crews relating to the dangerous operation of United aircraft through the Las Vegas area.

In the next preceding section of this brief, the Government has detailed the actual knowledge by officers of United Air Lines of the hazards prevailing in the Nellis-Las Vegas area. In drawing its findings [FF. 76, 77], the trial court undoubtedly also considered evidence of the practices and operating rules of United, instances of which include:

1. During cruise, and while in their seats, either the pilot and the flight engineer, or the co-pilot and the flight engineer are permitted to eat their meals together [24 Rep. Tr. 3280].

2. The captain, or, in his discretion, either the co-pilot or flight engineer, may be absent from the cockpit for periods of up to five minutes [24 Rep. Tr. 3289].

3. United had not issued any instructions to its flight officers to be more alert passing through the Nellis-Las Vegas area [24 Rep. Tr. 3246].

4. During cruise, smoking and drinking coffee by the crew is unrestricted. The pilot and co-pilot could smoke and drink coffee at the same time while in their seats [24 Rep. Tr. 3280-3282].

5. Any of the three crew members could use the public address system and direct the attention of the passengers to points of interest on the ground, such as Lake Mead, or Las Vegas [24 Rep. Tr. 3284].

6. Stewardesses had unrestricted access to the cockpit [24 Rep. Tr. 3287].

7. After setting the automatic pilot near Daggett, and noting in the log the time and altitude over Daggett [24 Rep. Tr. 3213-3214], the co-pilot and pilot had few other duties [24 Rep. Tr. 3218].

Based upon the foregoing evidence, the trial court could reasonably infer that during an interval of up to two minutes prior to the collision with the F-100F (and during its descent from 28,000 feet), while on automatic pilot, one of the crew members of the DC-7, or two of them, or even, perhaps, all of them, could have been distracted from scanning in that one was away from the cockpit, and that either or both of the others were smoking or drinking coffee, or doing both; or that meals were being served by a stewardess to one or more of the crew; or that the captain, or another of the crew, was using the public address system and calling the attention of the passengers to the city of Las Vegas which they were then approaching. Without belaboring other examples, the Government submits that the *evidence* referred to amply supports the trial court findings pertaining to a negligent lack of programmed, systematic scanning, and a negligent lack of adequate operating rules for guidance of United's aircraft through a dangerous area. A company rule forbidding all of the permissive distracting practices described above, and requiring specially alert scanning from unobstructed vision positions during the approach to and flight through the Nellis-Las Vegas area would seem to be mandatory under the hazardous conditions there prevailing, and consistent not only with due care under the circumstances, but consistent with United's duty of utmost care to its passengers.

The Government submits that there is an abundance of substantial evidence in support of the trial court findings [FF. 76, 77], and that they should be sustained.

B. Lack of Merit of United's Attack on the Findings Concerned With Pre-Collision Omission of United Officials.

The fallacy of United's contention that its crew could not see the F-100F due to visual limitations imposed by the windscreen structure undermines its contention that other negligent acts and omissions of its officials were merely passive in nature or were not the proximate cause of the collision.

In essence, United takes the position that even if its crew were fully aware of the nature and extent of training flights at Nellis, and even if instructive training and procedures in systematic scanning had been established and practiced, the collision would not have been averted because its crew could not have seen the F-100F in any event.

United thus makes its stand firmly, basically, and irrevocably upon the proposition as stated in its opening brief [p. 59].

> "United's pilots did not see because they could not see in time to avert the collision. . . . From this it follows that each of which we have termed the pre-collision omissions on the part of United necessarily disappear insofar as the chain of causation is concerned. . . ."

United obliquely suggests (United Brief, p. 57) that even if its pre-collision omissions be deemed to have been negligent at all, they were merely passive in nature. The Government, however, submits that it has

previously pointed out in this brief an abundance of evidence upon which this court can properly conclude that substantial evidence firmly supports the trial court's repeated findings that the negligent acts and omissions of United constituted active negligence and not passive negligence [FF. 72, 84; Conc. Law XIII; R. 2547, 2548, 2550].

The Trial Court Properly Denied Indemnity to United and Awarded Contribution to Both Defendants.

The argument by United in this court that the trial court erred in denying its claim for indemnity parallels its argument before the trial court on the same issue [R. 2205-2226]. There are, however, significant differences. First, the trial court found *as a fact* that United was guilty of active negligence [FF. 72, 84, Conc. Law XIII]. Second, the trial court found *as a fact* that United's negligence was not passive [FF. 72, 84; Conc. Law XIII]. Third, the trial court found *as a fact* that none of the negligent acts of the United States of America was a willful, wanton or intentional act of negligence [F. 86, Conc. Law XII]. Fourth, the trial court found *as a fact* that the careless acts and omissions of both defendants proximately and *concurrently* caused the collision, and that the defendants were *in pari delicto* [F. 82; Conc. Law XI].

The trial court made and entered an exhaustive Memorandum Opinion on the cross-claims of the defendants [R. 2408-2418], in which it specifically determined the issues of fact involved in the cross-claims, as those issues of fact were spelled out in the pre-trial conference order on cross-claims [R. 1777-1781].

The Opinion of the trial court in this regard clearly demonstrates that its findings are firmly grounded on sound concepts and application of law relating to indemnity and contribution, and completely dissipates the claim by United that the trial court findings are clearly erroneous.

Pertinent portions of the trial court's opinion, *Wiener v. United Air Lines,* S.D. Cal. 1962, 216 F. Supp. 701, are appended hereto as Appendix A in support of the Government's position that the findings here under consideration *are not* clearly erroneous, and are supported by substantial evidence, and that this court should so hold.

The cases cited by United in support of its claim for indemnity are not in point. No case cited has as a base, as in this case, two joint tortfeasors, both of whose negligence was found by the trier of fact to be active, and similarly found not to be passive; that the negligence of both was found to be the proximate and concurrent cause of the event; and that both were *in pari delicto.*

The *Snohomish* case, upon which United places emphasis, is a good example (*Snohomish County v. Great Northern Ry.,* 9 Cir. 1942, 130 F. 2d 996). In that case the jury found no negligence on the part of the railroad (seeking indemnity) as against the county (from whom indemnity was sought). The court, as the trier of fact on the issue of indemnity, found the railroad passively and not actively negligent as against its employees and passengers and, furthermore, found that the railroad and the county were not *in pari delicto.*

In its opinion (Appendix A), on indemnity, the trial court clearly distinguishes the *Snohomish* case on the facts—the essence of the distinction being that in this case the facts compel the conclusion that United was actively negligent, while in *Snohomish* the facts impelled the trier of fact to find only passive negligence.

This brings into focus the principal thrust of United on this appeal. It is that this court should re-weigh the evidence, and find United was merely passively negligent, or that the Government was guilty of willful or wanton or gross negligence. These are *issues of fact* which were tried and determined *by the trial court.* United does not claim that the trial court, as the trier of fact on the cross-claims, based its decision on any error of law either in the admission or rejection of evidence, or, based upon a misapprehension of the law of indemnity and contribution, as expressed by the trial court in its opinion (Appendix A).

This court has previously declined to do precisely that which United now urges it to do. *Elrick Rim Co. v. Reading Tire Machinery Co.,* 9 Cir. 1959, 264 F. 2d 481; *Smallfield v. Home Insurance Co. of New York,* 9 Cir. 1957, 244 F. 2d 337. As this court pointed out in the *Elrick* case at 486, ". . . it is not our function to make findings or to test the trial court findings through a weighing of the evidence." Further, United's position is akin to a re-trial of the case in this court. However, as this court indicated in *Hycon Manufacturing Co. v. H. Koch & Sons,* 9 Cir. 1955, 219 F. 2d 353, 355:

> "Third de novo, which was formerly the rule in admiralty, ecclesiastical courts and in some chancery cases, is definitely abolished in civil cases in

the federal courts by the rules constricting review. No authority is given except to District Courts to make new findings of fact."

In conclusion, the Government submits that the trial court findings regarding indemnity and contribution were bottomed on substantial evidence properly admitted, and based upon a proper application of controlling law and precedent, and that those findings should be sustained on this appeal.

The District Court Properly Dismissed United's Claims for Indemnity in the Government Employee and Servicemen Cases.

In its opening brief United challenges the dismissal of the "cross-claims" for indemnity in the "9 Government employee" cases. At the outset, the court's attention is called to the fact that in only seven of these cases were actual Government employees involved. Two of the cases, *Paris,* No. 18869, and *Darmody,* No. 18872, involved members of the military. The cross-claim in *Darmody* (asserted as a third party claim) was dismissed on the basis of *Feres v. United States,* 1950, 340 U. S. 135.[4] Further, in five of the employee cases United's claims for indemnity were made by way of counterclaim not cross-claim against the plaintiff United States Government.[5]

It should also be observed that in these cases United has sought only *indemnity.* Its contention in

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[4]See R. (Darmody) 231 and Appendix B. The basis for the holding in *Paris* is not altogether clear. 7 Rep. Tr. 423-26; 8 Rep. Tr. 564-81; R. (Paris) 244; and see *Rhodes v. United States,* S.D. Cal. 1962, 216 F. Supp. 732, referred to by the District Court in Vol. 7 reference above of the Reporter's Transcript.

[5]*Nollenberger,* No. 18866; *Thompson,* No. 18867; *Theobald,* No. 18868; *Pebles,* No. 18870; *Matlock,* No. 18872.

all the pleadings,[6] during the trial,[7] and on this appeal, is consistently and emphatically that it is entitled to indemnity, or full recovery over against the Government of all sums for which it may be adjudged to be liable to the several plaintiffs. On no occasion did United assert any claim against the Government for *contribution* in these nine instances.

A. The Dismissals Are Supported in the Record.

Although the specific grounds assigned by the court below in dismissing the cross-claims and counterclaims were proper, as the Government will presently show, the Government submits that the judgments of dismissal are otherwise supported in the record, and thus sustainable by this court. *Jaffke v. Dunham*, 1957, 352 U. S. 280. United urged the trial court, as it urges this court, to conclude that its own negligence was only passive (if negligent at all), while the Government's negligence was either active, or gross and willful; thus, providing a basis for indemnity. The Government has previously demonstrated in this brief that the trial court findings of United's active negligence are firmly supported by substantial evidence in the record. Accordingly, based upon those findings of active negligence on United's part, the trial court properly concluded that indemnity would not lie; hence, the claims of United for indemnity were dismissed. The Government submits that, based upon the grounds stated, the judgments of dismissal against United are supported by the record and should be affirmed.

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[6]See Part II, Appendix to Opening Brief of United Air Lines for specific record references to pleadings in each case asserting claim for indemnity.

[7]See for example, "Trial Transcript on Damage Issues and Cross-Claims," Vol. 1, pp. 9, 106, 111 (July 9 and 16, 1962).

B. The Government Has No Liability in Tort to the Decedents' Survivors.

Even if this court were to find a disparity in fault between United and the Government, we submit that United's action for indemnity must fall for another reason: the absence of tort liability on the part of the Government to the relations of the deceased employees and servicemen. In order to support a claim for indemnity, one person must have satisfied a legal liability owed by another. As the Restatement of Restitution points out, § 86 (1937), ". . . a person who has discharged a *tort claim* to which he *and another were subject* is entitled to indemnity or contribution from the other. . . ." (Emphasis added). In these nine cases, however, the Government is immune from suit by those persons to whom United might be forced to pay damages; its tort liability to the survivors and representatives of the employees having been removed by § 7(b) of the Federal Employees Compensation Act, and of the servicemen by the doctrine of *Feres v. United States,* 1950, 340 U. S. 135.

In *Drumgoole v. Virginia Electric & Power Co.,* E.D. Va. 1959, 170 F. Supp. 824, various reserve members of the United States Army brought suit against the electric company for injuries due to the defendant's negligence. The company brought a third party complaint against the United States seeking contribution or indemnity. The United States moved to dismiss the complaint on the ground that since the

United States would not be suable by the plaintiffs, it is not answerable in contribution or indemnity. The motion to dismiss was granted. The court explained at 825-826:

> "Save in collision situations in admiralty—the right to contribution or indemnity for damages, paid by one ship for personal injuries, there arises by law from the collision alone upon mutual fault —neither contribution nor indemnity may succeed without the support of the initial negligence. (Citations omitted.)
>
> "This principle is fatal to the defendant here. Virginia, while permitting contribution between co-tortfeasors, withholds it as against a joint offender who cannot in law be forced to answer to the plaintiff for his negligence. . . . Indemnity, likewise, in the same circumstances would be withheld. A priori, as the claimed contribution and indemnity must depend for success upon the alleged negligence of the Government towards the plaintiffs, and that is a negligence which is not actionable, the claim must fail."

In *Terminal R. Ass'n of St. Louis v. United States,* 8 Cir. 1950, 182 F. 2d 149, *cert. denied,* 340 U. S. 825, an action was brought against the United States for indemnity under the Federal Tort Claims Act. Since the alleged negligence on the part of the Government occurred before passage of the Act, the District Court dismissed the action. On appeal, the plaintiff argued that the liability of a principal tortfeasor to an indemnitee is not affected by the former's nonliability to the injured party. The Government countered that since the United States was not liable to the per-

son injured, the plaintiff could not now recover indemnity. In affirming the lower court, the Circuit Court stated at 151:

> "It is obvious that the United States was not under a legal obligation to Fitzjohn for the wrong done him by its employees in 1943, since at that time the Government had not consented to be sued upon tort claims. In The Western Maid, 257 U.S. 419, 433, 42 S.Ct. 159, 161, 66 L.Ed. 299, the Supreme Court said:
>
> " 'The United States has not consented to be sued for torts, and therefore it cannot be said that in a legal sense the United States has been guilty of a tort. For a tort is a tort in a legal sense only because the law has made it so. * * *
>
> " '* * * Legal obligations that exist but cannot be enforced are ghosts that are seen in the law but that are elusive to the grasp.'
>
> . . . . .
>
> "We think that the claim of the appellant for indemnity cannot logically be held to have risen above its source or to be anything more than an ethical claim against the Government. The appellant, in satisfying the judgment of Fitzjohn, discharged no obligation legally owing from the Government to Fitzjohn or to the appellant. It is therefore our opinion that the claim of the appellant for indemnity is not enforceable in the District Court under the Federal Tort Claims Act."

Additional support is found in the case of *Slattery v. Marra Bros.*, 2 Cir. 1951, 186 F. 2d 134, where the court upheld the dismissal of a claim by the third party

tortfeasor against the employer of the injured stevedore. Judge Learned Hand, in a well reasoned opinion, explained that for an action for indemnity to lie both parties must be liable to the same person for the joint wrong, or there must be a contract of indemnity between them. In this instance the employer's liability was removed by the Workmen's Compensation Act, and no contract existed between the parties. Accord, *Lo Bue v. United States,* 2 Cir. 1951, 188 F. 2d 800, 802 (claim for contribution); *American Mut. Liability Ins. Co. v. Matthews,* 2 Cir. 1950, 182 F. 2d 322, 323 (claim for contribution); *Mikkelsen v. The Granville,* E.D. N.Y. 1951, 101 F. Supp. 566, aff'd, 2 Cir. 1951, 191 F. 2d 858; *Lovette v. Lloyd,* 1953, 236 N. C. 663, 73 S. E. 2d 886, 892.

The sufficiency of United's claim for indemnity of course depends on the local law of Nevada, pursuant to the Federal Tort Claims Act (28 U. S. C., §1346(b)). We are unable to find and cite to this court any Nevada decision in point. We respectfully submit, however, that the Nevada court of last resort if confronted with this question would dismiss United's claim because of the absence of original tort liability on the part of the Government.

C. United Is a Person "Otherwise Entitled to Recover Damages" Under §7(b) of the FECA.

As a third argument, the Government contends that United is expressly barred from suit by §7(b) of the Federal Employees Compensation Act. It should be observed that unlike the above arguments relating to general principles of indemnity, the resolution of this contention requires an interpretation of a federal statute.

The relevant enactment provides, 63 Stat. 861, 5 U. S. C., §757(b),

> "The liability of the United States . . . with respect to the injury or death of an employee shall be exclusive, and in place, of all other liability of the United States . . . to the employee, his legal representative, spouse, dependents, next of kin, and *anyone otherwise entitled to recover damages* from the United States or such instrumentality, on account of such injury or death, in any direct judicial proceedings in a civil action or in admiralty, or by proceedings, whether administrative or judicial, under any other workmen's compensation law or under any Federal tort liability statute. . . ." (Emphasis added.)

On its face, the plain language of 7(b) would apply to United's claim. United is a person who would be "entitled to recover damages" from the United States, aside from this provision. United's cross-claims are "on account" of the death of the several Government employees. The action is brought under a "Federal tort liability statute" (28 U. S. C., §1346(b)). The statutory language (quoted above) has further import. As stated in *Underwood v. United States,* 10 Cir. 1953, 207 F. 2d 862, 864:

> "It is significant, we think, that the Congress chose to speak in terms of liability of the government, not in terms of remedies or rights of action, and in doing so, it gave a right of action only to the extent that it saw fit to relax governmental immunity from any liability."

In light of the foregoing, we submit that the court would be disregarding the clear mandate of Congress

were it to permit recovery by United on its cross-claims. This certainly must have been the feeling of the court in *Christie v. Powder Power Tool Corp.*, D. D. C. 1954, 124 F. Supp. 693, when it dismissed a third party claim against the Government solely on the basis of the statutory wording.

The dismissal of United's claims was also in accord with the purpose behind §7(b). As stated in the Senate Report No. 836, August 4, 1949, 81st Cong., 1st Sess., 23, 30, the provision serves "to make it clear that the right to compensation benefits under the act is exclusive *and in place of any and all other legal liability of the United States.* . . . Thus, an important gap in the present law would be filled and at the same time needless and expensive litigation will be replaced with measured justice. The *savings to the United States,* both in damages recovered and in the expense of handling the lawsuits, should be very substantial and the employees will benefit accordingly under the Compensation Act as liberalized by this bill." (Emphasis added.) If United were to succeed, the Government's liability would not be limited; "needless and expensive litigation" would not be alleviated; and "savings to the United States, both in damages recovered and in the expense of handling the lawsuits" would not result.

The Government submits then that the plain language of the statute and its underlying policy should not be circumvented by indirect means. The existence of a third party's negligence should not serve as a conduit for the recovery in a judicial proceeding of damages in excess of those permitted by the compensation statute. Furthermore, the statutory scheme would be subverted

in yet another manner. Under the provisions of Title 5, U. S. C. §776, the injured employee or beneficiary is required to assign to the United States any right of action he may have against another tortfeasor. It is due to this provision that the United States commenced five of the nine Government employee cases. It is obvious, however, that if the Government faced the threat of indemnity, it could not possibly proceed with the case in a diligent manner. The incentive of counsel would naturally be to keep damages at a minimum. For every dollar of damage represents a dollar out of the Government's pocket. In this respect note the analysis by Mr. Justice Black in a case interpreting a similar statute, *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*, 1956, 350 U. S. 124, 145-46 (dissenting opinion):

> "The actual effect of the Court's holding is this: The employer as an assignee of an employee's claim will know that if he wins a lawsuit, he loses a lawsuit. This knowledge will not give him a yearning anxiety to file suit. Even though he yields to the call of duty and files the lawsuit, he might not be exceedingly anxious to write a good complaint. His other pleadings might not be all that a zealous lawyer would desire. Although the employer must pay the judgment, his will be the opening argument to the jury. And when the last word is said in the closing argument, it will be made by counsel who knows that if he persuades the jury to give his client a verdict his client will have to pay it. Counsel will also know that if he happens to lose the case his client will be the winner."

Only two courts have dealt with the question whether the exclusivity provision of the FECA precludes a third party claim in a non-admiralty situation for contribution or indemnity, *Christie v. Powder Power Tool Corp., supra,* and *Drake v. Treadwell Constr. Co.,* 3 Cir. 1962, 299 F. 2d 789. Both of these decisions held against the third party, the latter case being vacated by the Supreme Court, *sub nom. Treadwell Constr. Co. v. United States,* 1963, 372 U. S. 772, however, based upon its prior decision in *Weyerhaeuser S. S. Co. v. United States,* 1963, 372 U. S. 597, judgment recalled and new judgment issued, 374 U. S. 820. See discussion *infra.*

Additional support for the Government's position is found in cases arising under section 5 of the Longshoremen's and Harbor Workers" Act[8] which is virtually identical to section 7(b). In both *Crawford v. Pope & Talbot,* 3 Cir. 1953, 206 F. 2d 784 (non-contractual action for indemnity denied), and *Brown v. American-Hawaiian S. S. Co.,* 3 Cir. 1954, 211 F. 2d 16, the court denied recovery against an employer in circumstances similar to those present here on the ground that the third party's suit was barred by section 5. In interpreting the effect of similar compensation statutes most courts have apparently found the exclusive remedy clause to bar claims against the employer for indemnity. See 2 Larson, Workmen's Compensation, §76.10 (1963 Supp.).

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[8]"The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death." 33 U.S.C. § 905.

D. The Government's Immunity From Suit by United Is Not Affected by the Weyerhaeuser and Treadwell Decisions.

As support for holding the Government liable in the instant cases, United places great emphasis upon the Supreme Court's decision in *Weyerhaeuser S. S. Co. v. United States, supra.* In view of the plain wording of that opinion we cannot agree. The Court took special pains to limit the holding to admiralty. At 600, the Court states:

> "We granted certiorari to consider the single question whether the historic admiralty rule of divided damages in mutual fault collisions has been qualified, as the Court of Appeals held, by the exclusive liability provision of the federal compensation statute. 369 U. S. 810. For the reasons stated in this opinion, we hold that this provision of the compensation statute does not so limit the admiralty rule, and we accordingly reverse the judgment of the Court of Appeals."

And in setting out its holding in the final paragraph of the decision, the Court stated at 604:

> "In this case, as in *The Chattahoochee,* we hold that the scope of the divided damages rule in mutual fault collisions is unaffected by a statute enacted to limit the liability of one of the shipowners to unrelated third parties."

Nowhere in the opinion are there any express statements embracing non-admiralty claims for contribution or indemnity. It is submitted that were the question presented to the Supreme Court, the Court would not extend the *Weyerhaeuser* decision to permit this claim

by United against the Government for indemnity. This conclusion is warranted by several considerations.

In contrast to the fairly recent and controversial actions for contribution and indemnity, see Prosser, Torts §46, at 246-51 (2d Ed. 1955), the rule of divided damages in admiralty is ancient, universal, and settled. The endurance of the rule was recognized throughout the *Weyerhaeuser* opinion. In *The "North Star",* 1882, 106 U. S. 17, the Court traced the rule back to the twelfth century Rules of Oleron and the thirteenth century laws of Wisbuy. Consequently, it is quite reasonable to believe that had Congress considered the matter, it would have expressly preserved this historic admiralty rule in section 7(b). Furthermore, the nature of the admiralty claim differs substantially from the nature of a claim for contribution or indemnity. While the latter actions require "common liability" on the part of the tortfeasors to the injured party, the admiralty rule is not founded upon the injured party's rights. As this court recognized in its decision in *United States v. Weyerhaeuser S. S. Co.,* 9 Cir. 1961, 294 F. 2d 179, 184:

> ". . . the suit based upon the admiralty rule is an independent cause of action not founded upon the injured employee's right but founded upon the employer's breach of a duty *to other shipowners* to exercise care in navigation."

This distinction was similarly assumed by the Supreme Court in *Weyerhaeuser,* 372 U. S. 603, when it referred to "*the correlative rights and duties of two shipowners* whose vessels had been involved in a collision in which both were at fault" (emphasis added). Thus, it is consistent to permit recovery in admiralty

by a shipowner of half of the damages he may have paid an injured party, while denying a tortfeasor such as United the common law remedies of contribution or indemnity.

Courts have commonly distinguished admiralty rules. For example, in *United States v. Shaw,* 1940, 309 U. S. 495, 502, the Court refused to apply the admiralty rule of divided damages to a probate proceeding. The case of *United States v. The Thekla,* 1924, 266 U. S. 328 was distinguished by the Court:

> "*The Thekla* turns upon a relationship characteristic of claims for collision in admiralty but entirely absent in claims and cross-claims in settlement of estates. The subject matter of a suit for damages in collision is not the vessel libelled but the collision. Libels and cross-libels for collision are one litigation and give rise to one liability. In equal fault, the entire damage is divided. As a consequence when the United States libels the vessel of another for collision damages and a cross-libel is filed, it is necessary to determine the cross-libel as well as the original libel to reach a conclusion as to liability for the collision. That conclusion must be stated in terms of responsibility for damages."

In *American Mut. Liability Ins. Co. v. Matthews,* 2 Cir. 1950, 182 F. 2d 322, a situation closely resembling the one at hand was presented. The third party tortfeasor had brought a libel for contribution against the employer stevedoring firm for damages which the former had paid to the latter's employee. The employer claimed that he was exempted from suit by the ex-

clusivity provision in the Longshoremen's and Harbor Workers' Act, 33 U. S. C. §905. That Act provides:

> "The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death. . . ."

In barring the third party's claim, the Second Circuit distinguished the admiralty case, *The Chattahoochee,* 1899, 173 U. S. 540, where the Supreme Court had held that the divided damage rule was not modified by the Harter Act.

> "At first blush it may seem that there is no difference between a statute which exonerates the carrying vessel from liability to its cargo, and one which exonerates an employer from liability to his employees for the negligent conduct of his business; and that, if the non-carrying ship which has been obliged to pay the cargo owners can recoup one-half from the carrying vessel, a shipowner who has been compelled to pay the damages sustained by the injured employee should similarly be able to recover one-half from the employer. However, we think there is a valid distinction. The Harter Act was not intended to affect the liability of one vessel to the other in a collision case; 'the relations of the two colliding vessels * * * remain unaffected by this act.' The Chattahoochee, 173 U.S. at page 540, 19 S. Ct. at page 497. Each vessel owed the other a duty of careful navigation.

> A breach of that duty by the carrying vessel is a contributory cause, together with the non-carrying vessel's own negligence, in producing the damage which the non-carrying vessel suffers, namely, liability to owners of the cargo. Such liability is one element of the total damages which under the admiralty rule both vessels are to bear equally when the faults of both contribute to the collision. In the case at bar the stevedoring firm never owed the shipowner a duty to discover defects in equipment which the shipowner furnished for its use in loading the ship. Its duty to discover patent defects in such equipment was owed only to its employees and that duty the Longshoremen's Act abolished, substituting therefor an absolute duty to pay compensation. Hence the attempted analogy between the Harter Act and the Act now before us cannot withstand analysis."

See also *Drumgoole v. Virginia Electric & Power Co.*, E.D. Va. 1959, 170 F. Supp. 824, 825-826.

In the instant appeal United attaches great importance to the statement by the Court, "There is no evidence whatever that Congress was concerned with the rights of unrelated third parties." 372 U. S. at 601. We fail to see how this statement constitutes an extension of the holding by the Court. It is simply an objective remark that there is no evidence in the record that Congress considered the rights of unrelated third parties. In view of the absence of such consideration by Congress, the duty falls upon the courts to determine what Congress would have decided had it considered this problem. We submit that while Congress may not have wished to modify the pertinent admiralty doc-

trine, its intent would certainly be violated if the Government were subject to damages in excess of the compensation statute simply by reason of the presence of a third party tortfeasor such as United.

United's view of *Treadwell Constr. Co. v. United States,* 1963, 372 U. S. 772 (per curiam), is also unacceptable. That decision does not constitute an extension of the *Weyerhaeuser* holding. The Court in vacating the Circuit opinion and remanding the case to the District Court was merely adhering to established procedure whenever a new case is decided which has some bearing on a prior decision which is appealed to the Supreme Court. For other instances, see *Torrance v. Callenius,* 1962, 369 U. S. 658 (per curiam); *Kemp v. United States,* 1962, 369 U. S. 661 (per curiam); *Public Service Commission v. Federal Power Commission,* 1959, 361 U. S. 195 (per curiam); *Joines v. United States,* 1958, 357 U. S. 573 (per curiam); *Cash v. United States,* 1958, 357 U. S. 219 (per curiam). If the Court had approved of the trial court's holding, there would have been no cause to remand the case to that court for further consideration. A simple affirmance of the trial court judgment would have been the appropriate decision. It is respectfully submitted that the remand simply reflects the Court's belief that the question should be considered by the District and Circuit Courts before the merits are considered by the court of last resort.

On the basis of the foregoing, we submit that the *Weyerhaeuser* and *Treadwell* decisions are not dispositive of the issue at hand; that the language and policy of section 7(b) precludes United's claims against the Government; and consequently, that the dismissals by the court below were proper.

Conclusion.

For all of the reasons stated in the premises, it is respectfully submitted that the judgment denying indemnity to United and awarding contribution to the Government from United should be affirmed.

Respectfully submitted,

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Certificate.

I certify that in connection with the preparation of this Brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion the foregoing brief is in full compliance with those rules.

DONALD J. MERRIMAN.

APPENDIX A.

Portion of Trial Court's Opinion in Wiener v. United States, S. D. Cal. 1962, 216 F. Supp. 701 (R. 2408-18).

I come now to the questions of indemnity and contribution.

They are separate questions.

I shall treat indemnity first.

Both are matters of substantive law and not procedural, hence the *lex loci* (Nevada) prevails, and not the *lex fori* (California).

There appears to be no Nevada statute and there are no Nevada cases on indemnity which even remotely approach the facts in this case.

The law of Nevada does not recognize the doctrine of comparative negligence between joint tort-feasors. Wells v. Choemake (1947) 64 Nev. 57, 177 P.2d 451 at 458.

Nevada, by Section 1.030 of the Nevada Revised Statutes (1957), adopts the common law when not in conflict with the Nevada Constitution and Statutes or the Constitution and Laws of the United States.

To ascertain the law which would be applied by the court of last resort of the State of Nevada, were the question before it, recourse must thus be had to jurisdictions having comparable death and negligence statutes to Nevada, which have applied the principles of the common law.

It would be an exercise in futility to analyze here the many cases from the many jurisdictions cited by the parties, and other cases examined by the Court, on

the subject of either indemnity or contribution, and it would compound confusion to attempt to reconcile the reasoning therein.

Suffice it to say that indemnity is the exception and not the rule. Of the many cases cited or examined from various jurisdictions where indemnity has been allowed, there was some special relationship existing between the joint, or concurrent, tort-feasors, or between one of them and the plaintiff, such as contractual (express, implied, or quasi-contractual), licensee-licensor, respondeat-superior, or a finding on the facts of no fault at all, or of "passive" or "constructive" negligence by the party recovering indemnity.

In this case, there is no such special relationship as a matter of fact or law, and I so find. The fact that United Air Lines was certificated by the United States, and was flying an IFR flight plan filed with the apporpriate government agency, on an airway established by the United States, and was in the air-space that its flight plan called for when the flight plan called for it, created no such special relationship in law or in fact so as to relieve defendant United Air Lines from exercising the degree of care required of it, under the facts in this case, to the Air Force plane.

Taking the case in its present posture, before indicating my decision on the facts as between the cross-claimants, which I shall presently do, there is a finding by the Court that the defendant United States is liable in that it was guilty of violating its duty of ordinary care to the plaintiffs, and there is the jury verdict that the United Air Lines Which had the duty of utmost care to the plaintiffs, is liable to the plaintiffs.

In searching for a comparable statute to that of Nevada where there is decisional law, I find that the death and negligence statutes of the District of Columbia are more nearly similar to those of Nevada than any others which have been drawn to my attention. And in the District of Columbia, as in Nevada, indemnity is not covered by statute, and the common law prevails in the absence of express statute.

In Busby v. Electric Utilities Employees Union (1944) 323 U.S. 72, 65 S.Ct. 142, 89 L.Ed. 78, the court held:

> "That law (of the District of Columbia) is derived from the common law and statutes of Maryland in force at the time of the cession of the District to the United States, as modified by statutes of Congress and *as determined and developed* by the courts of the District. Act of February 27, 1801, 2 Stat. 103." (Italics supplied.)

The matter of indemnity to a joint or concurring tort-feasor who was under the duty of utmost care to a third party from another joint or concurrent tort-feasor who was under the duty of only ordinary care to the same third party has been developed and determined in the District of Columbia by the District Court, and approved by the United States Court of Appeals for the District of Columbia.

In Warner v. Capital Transit Co. (Dist.Col. 1958) 162 F.Supp. 253, the question of indemnity for damages resulting from joint or concurrent negligence, from one owing the duty of ordinary care to one owing the duty of utmost care, was squarely met and decided, and that case is cited with approval by the United

States Court of Appeals for the District of Columbia in D. C. Transit System v. Slingland (1959) 105 U.S. App.D.C. 264, 266 F.2d 465, 72 A.L.R.2d 1290, cert. den. 361 U.S. 819, 80 S.Ct. 62, 4 L.Ed.2d 64.

In the Warner case the Court held that there was no right of indemnity on the part of the tort-feasor having the duty of utmost care to a plaintiff as against the tort-feasor having a duty of only ordinary care to the same plaintiff, and stated, 162 F.Supp. at page 256, as follows:

> "The Law of the District of Columbia does not recognize degrees of negligence. It defines negligence differently in respect to the care that a common carrier must exercise toward its passengers than it does in respect to negligence under other circumstances, but in either event, the issue is whether the defendant was negligent. Consequently, it is the view of this Court that there is no right of indemnity as between two joint tort-feasors, each of whom has been held guilty of negligence on its own part, merely because one is held accountable for the highest degree of care and the other for ordinary care."

The same rule applies in California which, like Nevada, follows the common law when not in conflict with statutory law. Atkinson Co. v. Merritt, Chapman & Scott Corp. (N.D.Cal.1956) 141 F. Supp. 833[3] and California cases there cited.

But it is not necessary to rely upon the doctrine pronounced by the above cases in the case at bar for the

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[3]While that case held there could be neither contribution nor indemnity, the California law has since been changed permitting contribution. [Calif. CCP, Sec. 875 added in 1957].

reason that the Court finds from the totality of all of the evidence that there was active and not passive or secondary negligence on the part of both defendants which concurred, and that such concurrent (or joint) negligence on the part of both defendants was the primary, efficient and proximate cause of the mid-air collision which caused the 24 deaths upon which these cases are founded. Each defendant, from the pilots up, including all concerned in the operational level of both defendants, breached the duty of ordinary care to the other, which each owed to the other, and as the parties have agreed, increases or decreases as do the dangers which should be apprehended. Each of the defendants were *in pari delicto*. Neither the United States nor the United Air Lines was guilty of wanton or wilful neglect.

In view of the above conclusions, none of the cases relied on by United Air Lines are in point, as in all of the cases cited by the parties or examined by the Court, no indemnity has been allowed where the parties were *in pari delicto* as they were here.[4]

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[4]United Air Lines cites a number of cases to the proposition that the failure to discover a dangerous condition by a public carrier and to take reasonable steps to remedy it entitled them to indemnity. All of the cases are distinguishable on the facts, or in the legal relationship of the parties coupled with the facts. Snohomish County v. Great Northern Railroad Co. (C.C.A.9, 1942) 130 F.2d 996, is a good illustration of that disparity. In 1937, after an 8 to 10 day rain, a fill and culvert, built and worked on and maintained by the County since 1910, proved inadequate, resulting in flooding with water, gravel, logs and other debris flowing over the railroad right-of-way, derailing a train and causing damages from which two suits by the Railroad against the County resulted. One suit was for damages to the train and the right-of-way, and the other was for indemnity for sums which the railroad had paid out on claims for personal injury. The jury decided against the County and for the railroad in the damage case—thus holding the railroad not guilty of negligence in the exercise of

Neither defendant is entitled to indemnity from the other.

I come now to the question of contribution.

As with indemnity, there is no Nevada statute and no Nevada cases that can be found which are authoritative on the question of contribution. We must, therefore, look to the principles of common law.

In many jurisdictions it was held that the principles of common law did not allow contribution between joint or concurrent tort-feasors. But this proposition which puts a premium on delay, evasion, and sequestration of property by a joint tort-feasor who can and will resort to such tactic, and puts a punishment on a joint tort-feasor who can be caught first by the judgment

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ordinary care to the County. Here, the Court finds United Air Lines did not exercise ordinary care to the United States. The court in the Snohomish case found for the railroad on indemnity for money which it had paid to its passengers, and held that the railroad was guilty of only *passive or constructive* negligence in its failure to discover the defective condition of the fill and culvert, which it would have done by a reasonably careful inspection of its right-of-way. There, the flood waters crossed the right-of-way once in 27 years, and then after an 8 to 10 day rain. Here, for six years or more the United States had flown from 200 to 250 sorties a day, of which 40 to 60 were Jet penetrations on, over and across the airway Victor-8 used by United Air Lines, at speeds just below and in excess of the speed of sound. There were previous near-misses with United Air Lines planes. The planes of the United States weighed tons. United Air Lines was given a map showing the areas of combat training, target practice, bombing range, acrobatic maneuvers, dog-fighting areas, formation flying, and other maneuvers used by the Air Force, and which lay on both sides of Victor-8. Nellis field was on Victor-8. Yet no one in United Air Lines made any effort to ascertain from the Air Force any schedule or times of flying, the heights, speeds, maneuvers, or jet penetrations, or other details of the highly dangerous flying activity at Nellis. There just is simply no comparability of facts to give Snohomish any precedential value or binding authority in this case.

creditor, has been repudiated in many jurisdictions, either by statute or by case law. Moreover, the application of that doctrine leaves the way open for collusion between a plaintiff and one joint tort-feasor against a third or other joint tort-feasor.

In 1942 the United States Court of Appeals for the District of Columbia in George's Radio v. Capital Transit Co., 75 U.S. App.D.C. 187, 126 F.2d 219, examined the common law rule at length with reference to many cases, and concluded that contribution was allowable between joint (or concurrent) tort-feasors in the absence of wilful or intentional misconduct. The Court said, 126 F. 2d at pages 220-221:

> "And this, we think, is the present trend of those courts in which the question has recently been considered. And the reason for the change of view, though variously expressed, in the main hinges on the doctrine that general principles of justice require that in the case of a common obligation, the discharge of it by one of the obligors without proportionate payment from the other, gives the latter an advantage to which he is not equitably entitled. As the result, it is now, we think, definitely established in the better considered cases that there may be contribution in favor of one who has vicariously been required to bear the whole loss.
>
> "We are, therefore of opinion that the rule denying contribution in favor of unintentional or negligent tort-feasors is wrong to the same extent that it would be wrong to enforce contribution in

> the case of wilful wrongdoers or those guilty of flagrantly wrongful conduct, and we cite in the footnote below some of the cases in which the position we take is logically sustained."

In Knell v. Feltman (1949) 85 U.S. App.D.C. 22, 174 F.2d 662, that court again examined the origin of the rule, and found, and I think correctly so, that the true common law rule of no-contribution was that there could be no contribution only when both joint tort-feasors were wilful or intentional wrong-doers, and sustained the right of contribution between joint tort-feasors, even when the injured party sought and obtained judgment against only one of them.

The case of D. C. Transit System v. Slingland (1959) 105 U.S.App.D.C. 264, 266 F.2d 465, 72 A.L.R.2d 1290, cert. den. 361 U.S. 819, 80 S.Ct. 62, 4 L.Ed.2d 64, is somewhat analogous to the case at bar in that the plaintiff recovered judgment against both the public carrier (D. C. Transit System) and the United States for personal injuries. The court pointed out that the acts of the drivers of the bus and the mail truck united to produce the result and constituted mutually contributing and concurrent acts which caused the injury to the plaintiff. It followed the doctrine of Knell v. Feltman, supra, and of the previous case of George's Radio v. Capital Transit Co., supra, in holding that contribution is proper between non-intentional or wilful joint tort-feasors.

[8] I conclude that neither party is entitled to indemnity from the other and that each is entitled to contribution from the other so that neither will be compelled to bear the whole loss, except that United Air Lines cannot recover any portion of the costs which may be assessed against it from the United States, as the Tort Claims Act precludes it. It should be noted also that in the event judgments in differing amounts are assessed against either defendant, the Court may not necessarily follow the rule of percentage contribution set out in the Slingland case, supra, but reserves its ruling in such cases to await the event.

At the earliest opportunity, the Court will settle findings of fact and conclusions of law in conference with counsel.

APPENDIX B.

In the United States District Court for the District of Nebraska

Mary F. Darmody, Administratrix of the Estate of Robert E. Darmody, Deceased, Plaintiff v United Air Lines, Inc., a Corporation, Defendant. Civil 0929.

This matter comes before the Court pursuant to Rule 16, Rules of Practice, United States District Court for the District of Nebraska, upon the motion of the third-party defendant, the United States of America, for an order dismissing the Complaint herein filed as provided by Rule 12(b)(6) of the Federal Rules of Civil Procedure in that said Complaint fails to state a claim upon which relief can be granted.

This action was filed by Mary F. Darmody, Administratrix of the Estate of Robert E. Darmody, deceased against United Air Lines, Inc., for damages arising out of the death of Robert E. Darmody. United Air Lines filed a third-party complaint designating the United States of America a third-party defendant, wherein it demands judgments against the United States of America third-party defendant, for all sums that may be adjudged against the defendant, United Air Lines, in favor of Mary F. Darmody, Administratrix of the Estate of Robert E. Darmody, deceased, in this action. The Court is of the opinion that the motion to dismiss the third-party complaint should be sustained. From an examination of the record it appears that Robert E. Darmody was a Major in the United States Air Force on active duty and that at the time of the accident which resulted in his death was enroute to SAC Headquarters, Omaha, Nebraska, for temporary

duty and under these circumstances he cannot recover damages from the United States for his personal injuries. *Feres v United States* 340 U.S. 135.

It follows that the defendant and third-party plaintiff, United Air Lines, cannot look to the United States for indemnity or contribution for any judgment awarded the plaintiff herein against the defendant. Accordingly,

It Is Ordered that the third-party complaint filed herein by and it hereby is dismissed at defendant's cost.

Dated this 1st day of September, 1961.

By The Court:

RICHARD E. ROBINSON
Chief Judge, United States
District Court